SETIA HARIAN SDN BHD A

v.

SEA EAGLE MARITIME SDN BHD & ORS

HIGH COURT MALAYA, JOHOR BAHRU B
VERNON ONG LAM KIAT JC
[CIVIL SUIT NO: (MT-1) 22-579-2005]
13 JANUARY 2010

CUSTOMS AND EXCISE: *Customs duties - Assessment of - Duty short paid - Seizure of imported consignment of beer due to plaintiff's non-payment of additional duty short paid - Whether 1st defendant negligent in discharging its duty as plaintiff's customs agent - Whether plaintiff's suit against 2nd and 3rd defendants in tort ought to be struck out for non-compliance with ss. 5 and 6 Government Proceedings Act 1956 - Whether plaintiff liable to pay additional duty short paid - Customs Act 1967, s. 17 - Federal Constitution, art. 7 - Government Proceedings Act 1956, ss. 5, 6* C D

CUSTOMS AND EXCISE: *Forfeiture - Seizure of imported consignment of beer - Non-payment of additional duty short paid - Whether 1st defendant negligent in discharging its duty as plaintiff's customs agent - Whether plaintiff's suit against 2nd and 3rd defendants in tort ought to be struck out for non-compliance with ss. 5 and 6 Government Proceedings Act 1956 - Whether plaintiff liable to pay additional duty short paid - Customs Act 1967, s. 17 - Federal Constitution, art. 7 - Government Proceedings Act 1956, ss. 5, 6* E F

AGENCY: *Liability of agent - Customs agent - Preparation of customs declaration form - Customs duty payable on imported consignment of beer - Whether imposition of duty short paid and fine on principal a consequence of agent's negligence - Whether agent clearly failed to discharge its duty* G

CIVIL PROCEDURE: *Government proceedings - Suit against government in tort - Vicarious liability - Assessment of customs duty - Whether officers responsible for alleged wrongdoing must be joined as defendants to the action - Whether impossible for plaintiff to maintain a successful claim otherwise - Government Proceedings Act 1956, ss. 5, 6* H

I

A ***CONSTITUTIONAL LAW:*** *Fundamental liberties - Double jeopardy - Whether subjecting a person to repeated prosecutions for same offence would offend art. 7 Federal Constitution - Customs Act 1967, s. 17 - Federal Constitution, art. 7*

B ***TORT:*** *Negligence - Duty of care - Customs agent - Preparation of customs declaration form - Customs duty payable on imported consignment of beer - Whether imposition of duty short paid and fine on principal a consequence of agent's negligence - Whether agent clearly failed to discharge its duty*

C ***TORT:*** *Vicarious liability - Government liability - Assessment of customs duty - Claim by plaintiff in negligence - Whether officers responsible for alleged wrongdoing must be joined as defendants to the action - Whether impossible for plaintiff to maintain a successful claim otherwise - Government Proceedings Act 1956, ss. 5, 6*

D

The plaintiff imported a consignment of beer from China and appointed the 1st defendant to assist it in the customs clearance. The 1st defendant's agent informed the plaintiff that the customs duty – indicated in the customs declaration form prepared by the E 1st defendant – was RM36,751.20. The plaintiff paid the customs duty and the consignment of beer was released and delivered to the plaintiff's premises. However, the 2nd defendant later raided the plaintiff's premises and the plaintiff had to settle the duty short paid of RM16,454 and a compound of RM5,000. Subsequently, the 2nd F defendant issued a notice of seizure claiming RM261,214.56 in duty short paid and seized the consignment of beer. The plaintiff did not pay the additional duty short paid and the consignment of beer was forfeited. The plaintiff thus sought a declaration stating that the seizure of the beer was null and void, and also claimed for damages. G It was the plaintiff's contention that the beer was forfeited due to the 1st defendant's negligence in discharging its duty as the plaintiff's customs agent and also because of the 2nd defendant's negligence or failure to properly assess the customs duty. The 2nd and 3rd defendants filed a counterclaim for the duty short paid of H RM261,214.56. The principal issues requiring determination were: (i) whether the 1st defendant was negligent in discharging its duty as the plaintiff's customs agent; (ii) whether the suit against the 2nd and 3rd defendants ought to be struck out for non-compliance with ss. 5 and 6 of the Government Proceedings Act 1956 ('GPA'); I and (iii) whether the plaintiff was liable to pay the customs duty of RM261,214.56.

Held (allowing the plaintiff's claim against the 1st defendant with costs, with damages to be assessed by Deputy Registrar; dismissing the plaintiff's claim against the 2nd and 3rd defendants with costs; dismissing the 2nd and 3rd defendants' counterclaim with costs):

(1) The facts of the case showed that the 1st defendant, for some unknown reason, prepared two different customs declaration forms, K1 and K1A, for the consignment of beer. The plaintiff relied entirely on K1 as showing the customs duty payable on the consignment of beer whereas the defendant, relying on K1A, submitted that the plaintiff only paid RM20,297.20, leaving a shortfall of RM16,454. Thus, the imposition of the fine of RM5,000 and the payment of the duty short paid of RM16,454 was a consequence of the 1st defendant's negligence. The subsequent seizure of the consignment of beer was also a result of K1 and K1A. As a licensed customs agent and freight forwarder the 1st defendant had a duty to ensure that they entered the correct details such as the quantity, tariff code and other particulars of the consignment in the customs declaration forms. That the 1st defendant had clearly failed to discharge its duty was borne out by the events that followed to the plaintiff's detriment. (paras 10-13)

(2) The Federal Court in *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* held that on a proper construction of ss. 5 and 6 of the GPA, in any claim in tort against the Government, the officer of the Government who was responsible for the alleged tortious act must be made a party and his liability must be established before the Government can be made liable vicariously as principal. In the present case, the cause of action was in tort, or tort-based, premised on the acts or omissions of the 2nd defendant's officers. As the officers responsible for the alleged wrongdoing were not joined as defendants to the action, it was not possible in law to maintain a successful claim in tort against the Government as primary tortfeasors. It followed that the plaintiff's claim against the 2nd and 3rd defendants must fail. Accordingly, the substantive issues would not be considered. *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* (foll); *Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors* (foll); *Haji Abdul Rahman v. Government of Malaysia & Anor* (foll); *Lai Seng & Co v. Government of Malaysia & Ors* (dist). (paras 17-18)

(3) Under s. 17 of the Customs Act 1967 ('s. 17') – which deals with payment of duty short paid – the person liable to pay such customs duty shall pay the deficiency on demand. In this instance, the 2nd defendant exercised its power under this provision when DW3, a customs officer, demanded that the plaintiff pay the deficiency of RM16,454 under the notice of seizure, and although the plaintiff paid the deficiency and compound of RM5,000, DW3 returned to the plaintiff's premises demanding payment of another deficiency of RM261,214.56 under the same notice of seizure. On this occasion DW3 was also acting pursuant to s. 17. In such circumstances, it was not fair and reasonable for the 2nd defendant to demand payment on the second occasion. The provision of s. 17 may be resorted to in a situation in which there is a deficiency due to one instance of inadvertence or error on the part of the customs officer, and should not be extended to cover situations of instances subsequent to the first instance. To hold otherwise would offend art. 7 of the Federal Constitution as it opened a person to repeated prosecutions for the same offence. This interpretation was also borne out by the compound which clearly stated that the goods were released without any condition. *Public Textiles Berhad v. Lembaga Letrik Negara* (dist); *Fairways Liquors Sdn Bhd v. Ketua Pengarah Kastam* (dist). (para 24)

Case(s) referred to:

Fairways Liquors Sdn Bhd v. Ketua Pengarah Kastam [1993] 1 LNS 213 ***(dist)***

Haji Abdul Rahman v. Government of Malaysia & Anor [1966] 1 LNS 60 HC ***(foll)***

Jamali Adnan v. PP [1985] 2 CLJ 415; [1985] CLJ (Rep) 167 SC ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(foll)***

Public Textiles Berhad v. Lembaga Letrik Negara [1976] 1 LNS 120 FC ***(dist)***

Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors [2000] 4 CLJ 508 HC ***(foll)***

Lai Seng & Co v. Government of Malaysia & Ors [1973] 1 LNS 70 HC ***(refd)***

Legislation referred to:

Customs Act 1967, ss. 17(1), 22B, 133(1)(a), 135

Federal Constitution, art. 7(2)

Government Proceedings Act 1956, ss. 4, 5, 6(1), (4), 18

For the plaintiff - Yahya Chua (Gavin Low Peng Kuan with him); M/s Kuan & Co
For the 1st defendant - Navamani Arumugam; M/s Ong Ban Chai & Co
For the 2nd & 3rd defendants - Nor Ariffin SFC

Reported by Suresh Nathan

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] In 2003 Setia Harian Sdn. Bhd. (the plaintiff) imported a consignment of beer from China. The consignment of beer was released after the plaintiff paid the customs duty on the consignment. Later the plaintiff's premises was raided by the customs department (2nd defendant) and the plaintiff settled the short paid duty of RM16,454 and a compound of RM5,000. Subsequently the 2nd defendant issued a notice of seizure claiming RM261,214.56 in duty short paid and seized the consignment of beer. The plaintiff did not settle the additional duty short paid and the consignment of beer was forfeited.

Plaintiff's Case

[2] The plaintiff imported 3550 cartons of Sendi Green Beer from China through Pelabuhan Pasir Gudang, Johor. The plaintiff appointed Sea Eagle Maritime Sdn. Bhd. (the 1st defendant) to assist the plaintiff in the customs clearance. The 1st defendant's servant or agent one Hasnan informed the plaintiff that the customs duty was RM36,751.20. The customs duty was indicated in the customs declaration of goods imported form which was prepared by the 1st defendant. The plaintiff paid the customs duty. After payment was made the 1st defendant took delivery of the consignment of beer and delivered it to the plaintiff's premises. On 25 August 2003 the 2nd defendant informed the plaintiff that only RM20,297.20 customs duty was paid and there was a short paid duty of RM16,454. A Notis Penerimaan Tawaran Kompaun was then issued to the plaintiff. The plaintiff paid up the duty short paid and a fine of RM5,000. On or about 29 August 2003 the 2nd defendant informed the plaintiff that the customs duty is RM261,214.56 and a notice of seizure dated 28 August 2003 was issued. However, on or about 1 September 2003 the 2nd defendant seized the beer.

[3] The plaintiff contends that the beer was forfeited due to the 1st defendant's negligence in discharging its duty as the plaintiff's customs agent. The plaintiff also contends that the forfeiture of the beer was due to the negligence or failure of the 2nd defendant to properly assess the customs duty. The seizure of the beer is null and void. The plaintiff is claiming for a declaration that the seizure of the beer under the notice of seizure dated 25 August 2003 is null and void and for damages of RM375,052.71 or damages to be assessed together with interest and costs.

1st Defendant's Case

[4] Hasnan represented to the 1st defendant that he was a partner of the plaintiff and asked the 1st defendant to assist in the customs clearance for the plaintiff's beer. The 1st defendant prepared the documents for customs clearance of the beer and submitted them to the 2nd defendant. All the documents submitted were approved by the 2nd defendant and the customs duty which was approved and paid was RM20,297.20. Hasnan paid the customs duty and the beer was then transported to the plaintiff's premises. On the following day the 1st defendant handed over all the documents to the 2nd defendant. Hasnan was called by the 1st defendant and taken to the 2nd defendant's office for investigation. Subsequently, a compound of RM5,000 was imposed and the plaintiff also paid the short paid duty of RM16,454.

2nd & 3rd Defendants' Case And Counter-claim

[5] Acting on information the 2nd defendant raided the plaintiff's premises and seized 3,479 cartons of beer and a document file and issued a notice of seizure dated 25 August 2003. The plaintiff produced a copy of Borang K1 dated 14 August 2003 which did not have a registration number or payment details printed on it. The 2nd defendant also raided the 1st defendant's office and obtained (i) a copy of Borang K1 dated 15 August 2003 bearing registration J15-1-08004275-03 and payment of RM20,297.20; (ii) a copy of invoice serial no. INV001/07/03 dated 10 July 2003. Following investigations a fine of RM5,000 was offered and the plaintiff paid the fine and a further sum of RM16,454 for the duty short paid. After payment of the same the 2nd defendant recalculated the customs duty again and found that there was still a short paid of RM261,214.56. Therefore a notice of claim dated 15 December 2003 was issued to the plaintiff claiming for the duty short paid.

The Facts As Disclosed In The Evidence

[6] Sometime in mid 2003 the plaintiff appointed the 1st defendant to take care of the customs clearance for the importation of beer from China. The 1st defendant is a licensed forwarding and shipping agent. Hasnan was acting as a middleman between the plaintiff and the 1st defendant. The 1st defendant prepared 2 sets of "Customs Declaration Form For Goods Imported". The first form ('K1') dated 14 August 2003 declared the duty payable as RM36,751.20; the other form ('K1A') dated 15 August 2003 declared the duty as RM20,297.20. Relying on K1 the plaintiff's director one Tan See Sui (PW1) paid RM36,751.20 in cash at the customs cashier counter in Pelabuhan Pasir Gudang on 15 August 2003 whereupon the consignment of beer was released and transported to the plaintiff's premises. Subsequently on 25 August 2003 the 2nd defendant raided the plaintiff's premises. Razali bin Hut (DW3) a customs officer informed PW1 that the customs duty paid was only RM20,297.20 and that there was a short paid of RM16,454. DW3 issued a notice of seizure dated 25 August 2003 to the plaintiff. On 26 August 2003 the 2nd defendant issued a 'Penerimaan Tawaran Kompaun Kerana Melakukan Kesalahan Di Bawah Akta Kastam, 62/1967' ('the Compound') which the plaintiff accepted when it paid the duty short paid of RM16,454 and a fine of RM5,000 totalling RM21,454 to the 2nd defendant. Following the payments no seizure of the beer was made. However, on 29 August 2003 the 2nd defendant DW3 informed the plaintiff that the actual customs duty payable for the beer was RM261,214.56. The plaintiff did not pay the alleged actual customs duty and the beer was seized by the 2nd defendant on 2 September 2003. By a letter dated 15 December 2003 the 2nd defendant notified the plaintiff that if the plaintiff failed to settle the sum of RM261,241.56 within 30 days the beer would be forfeited. As at the date of the trial the beer has not been released to the plaintiff and the 2nd defendant has yet to prosecute the plaintiff for the alleged customs duty of RM261,214.56.

Findings Of The Court

[7] It is not disputed that the 1st defendant acted for the plaintiff when it was handling the customs declaration for the importation of the consignment of beer. The principal question to be determined on the claim against the 1st defendant relates to whether the 1st defendant was negligent in performing its duty in that regard. The

claim against the 2nd and 3rd defendant, however, is subject to the issue of whether ss. 5 & 6 of the Government Proceedings Act 1956 have been complied with. There is also the issue of the 2nd and 3rd defendant's counter-claim for the short paid customs duty of RM261,214.56. On the aforesaid premises the three principal issues to be determined are as follows:

- Whether the 1st defendant was negligent in discharging its duty as the plaintiff's customs agent?
- Whether the suit against the 2nd and 3rd defendants ought to be struck out for non-compliance of ss. 5 & 6 of the Government Proceedings Act 1956?
- Whether the plaintiff is liable to pay the customs duty of RM261,214.56?

Whether The 1st Defendant Was Negligent In Discharging Its Duty As The Plaintiff's Customs Agent?

[8] Two (2) different customs declaration forms were prepared by the 1st defendant for the consignment of beer. K1 was prepared by one Dickey Mohd Kamal Shariff an employee of the 1st defendant who has since resigned. According to K1 the customs duty payable is RM36,751.20. PW1 relying on K1 paid RM36,751.20 at the customs cashier counter at Pelabuhan Pasir Gudang after which the consignment of beer was released and transported to the plaintiff's premises.

[9] K1A is the other customs declaration form wherein RM20,297.20 is stated as the customs duty. K1A was prepared by Abdul Rizal bin Mohamad (DW1) an employee of the 1st defendant. For the purposes of preparing K1A DW1 received two invoices both dated 10 July 2003 under reference no. INV001/07/03 from Hasnan. The first invoice (Invoice A) describes the quantity as '3,550 carton' of 'Sen Di Green Beer with pure spring water and spirulina (3.7% alcoholic)'. The contents of the other invoice (Invoice B) is similar save and except that it also describes the quantity in detail as '3,550 cartoon/(3,550 carton x 12 bottle x 630ml)'. It is DW1's evidence that in filling up K1A he only relied on Invoice A and the information provided by Hasnan. DW1 chose not to rely on Invoice B even though Invoice B contains the relevant details as to the quantity which was necessary for the purposes of completing the customs declaration form.

[10] The point to note is that there should be only one customs declaration form for the importation of the consignment of beer. For some unknown reason the 1st defendant created two forms – K1 and K1A. The plaintiff relied on K1 and paid the customs duty as stated. On the other hand, the 2nd defendant relying on K1A contends that the plaintiff only paid RM20,297.20 leaving a shortfall of RM16,454. K1A contains a printout of the registration number 'J15-08004275/03' and payment details; in contrast K1 does not have either details printed on it. For some inexplicable reason, even though PW1 paid RM36,751.20 in cash at the customs cashier counter in purported reliance on K1, there in no printout of such payment on K1. Instead, there is only a printout receipt of payment of RM20,297.20 on K1A.

[11] This discrepancy came to light when DW3 raided the plaintiff's premises on 25 August 2003. On inspection DW3 found that K1 was not in order as it did not contain a registration number and a printout of receipt of payment. DW3 then issued a Notice of Seizure dated 25 August 2003 to the plaintiff. DW3 then proceeded to the 1st defendant's office where he obtained the K1A form. After comparing K1 and K1A DW3 found that there was a customs duty short paid of RM16,454. DW3 then issued the Compound to the plaintiff on 26 August 2003. The plaintiff paid the duty short paid and fine of RM5,000. DW3 issued a receipt for the aforesaid payment of RM21,454 under receipt no. DT974112 dated 26 August 2004. No seizure of the beer was made and the plaintiff was discharged on the following terms as stated in the Compound:

> Dengan membayar penuh cukai dan denda barang-barang yang menjadi perkara didakwaan di atas akan:
>
> (a) dilepaskan tanpa syarat;

[12] Notwithstanding the above DW3 returned to the plaintiff's premises on 2 September 2003. After serving PW1 with the same notice of seizure dated 25 August 2003 DW3 seized the consignment of beer. Now DW3 told PW1 that the actual customs duty is RM261,214.56. By a letter dated 15 December 2003 the 2nd defendant gave the plaintiff 30 days to pay the short paid customs duty otherwise the consignment of beer will be forfeited. The plaintiff has refused to pay the additional customs duty as it is five times the purchase value of the consignment of beer of

A RM56,679.58. Had the plaintiff known that they would have to pay a sum of RM261,214.56 they would not have imported the beer in the first place; it did not make any business sense.

[13] The 1st defendant's focus on the role Hasnan played is misplaced. It is not denied that the 1st defendant created K1 and K1A. DW1 was in possession of the relevant invoices before preparing K1. Dickey Kamal who prepared K1A was an employee of the 1st defendant at the material time. Muhammad Hapis bin Jamil (DW2) the 1st defendant's managing director admitted in cross-examination that the 1st defendant's operations clerk Mohd Nizam prepared K1. DW2 terminated Mohd Nizam's services as he had prepared K1 in collaboration with Hasnan without DW2's knowledge and approval. The plaintiff relied entirely on K1 as showing the customs duty payable on the consignment of beer. In the final analysis it is clear that K1 and K1A emanated from the 1st defendant's office. Whilst K1 was prepared by DW1, K1A was prepared by Mohd Nizam and Dickey Kamal, all of whom were employees of the 1st defendant at that time. DW1 admitted that he mistakenly recorded the quantity in K1A. The imposition of the fine of RM5,000 and the payment of the duty short paid of RM16,454 was a consequence of the 1st defendant's negligence. The subsequent seizure of the consignment of beer was also a result of K1 and K1A. As a licensed customs agent and freight forwarder the 1st defendant had a duty to ensure that they entered the correct details such as the quantity, tariff code and other particulars of the consignment in the customs declaration forms. That the 1st defendant had clearly failed to discharge its duty expected of it is borne out by the aforesaid events that followed to the detriment of the plaintiff. For the foregoing reasons the question is answered in the affirmative.

Whether The Suit Against The 2nd And 3rd Defendants Ought To Be Struck Out For Non-compliance Of ss. 5 & 6 Of The Government Proceedings Act 1956?

[14] Sections 5 and 6 of the Government Proceedings Act 1956 (GPA) provide as follows:

> **5. Liability of the Government in tort**
>
> Subject to this Act, the Government shall be liable for **any wrongful act done or any neglect or default committed by any public officer** in the same manner and to the same extent as

that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting to act in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

6. Limits of liability of the Government

(1) No proceedings shall lie against the Government by virtue of section 5 in respect of **any act, neglect or default of any public officer,** unless proceedings for damages in respect of such act, neglect or default would have **lain against such officer personally.**

(4) No proceedings shall lie against the Government by virtue of section 5 in respect of **any act, neglect or default of any public officer,** unless that officer was at the material time employed by the Government and paid in respect of his duties as an officer of the Government wholly out of the revenues of the Government, or any fund certified by the appropriate financial officer for the purposes of this subsection or was at the material time holding an office in respect of which the appropriate financial officer certifies that the holder thereof would normally be so paid.

(Emphasis added)

[15] Learned Federal Counsel submitted that an action for damages should be brought against the officer personally before the Government can be held vicariously liable for the action done by that officer. In *Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors* [2000] 4 CLJ 508 the claim against the 9th and 10th defendants were for both negligence and nuisance. In that case the State Legal Advisor of Selangor argued that by the provisions of ss. 5, 6(1), 6(4) and 18 GPA the particular officers in the Government who committed the tortious wrongs must be identified otherwise the claim against the 10th defendant must fail. At p. 600 James Foong J (now FCJ) said:

When there is a necessity to first decide whether a particular officer of officers, as the case may be, is negligent or has committed a tortuous wrong, before the Government can be held liable, then it is absolute necessary and essential to identify and name the particular officer or officers whom the plaintiff alleged committed

A the negligence or tortuous wrong. If he is not liable then the government is also exempted from liability. This is the concept of vicarious liability under common law. In this situation we have even statutory provisions to affirm this approach where they continuously assert and declare the need to determine fault of that particular officer before the government can be held liable. This clearly implies a need to identify and distinguish the officer or officers concerned before the plaintiffs can proceed with attributing liability to the government. In this situation at hand, only the drainage and irrigation department was named in respect of matters related to drainage. This is a department operated by officers. Who then was the officer or officers who committed the act of omission? Without him being specified and singled out how could be liability against him be ascertained. Without the determination of his liability how could the 10th defendant be found liable. Similarly in respect of other acts or omissions involving the surrendered lands no individual was specified or mentioned, not even the particular department of state's machinery. Such defects, in my opinion are too serious and fundamental for such proceedings against the Government to succeed; it must fail for non-compliance of the legislative provisions laid down for such action against a State Government.

[16] In *Haji Abdul Rahman v. Government of Malaysia & Anor* [1966] 1 LNS 60 the plaintiff bought an action to recover damages arising out of a traffic accident which took place on 2 April 1963. The action was not commenced until 18 January 1965 and the driver of the Government motor vehicle was not made a party to the action. Abdul Aziz J (later FCJ) held that as the action was not commenced within 12 months after the alleged neglect of default and the servant of the Government was not also made a defendant to the action, the action could not proceed and must be dismissed.

[17] Justice Aziz's approach in *Haji Abdul Rahman v. Government of Malaysia & Anor, supra* was upheld by the Federal Court in *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663. The Federal Court held that on the proper construction of ss. 5 and 6 GPA, in any claim in tort against the Government, the officer of the Government who was responsible for the alleged tortious act must be made a party and his liability must be established before the Government can be made liable vicariously as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only on a successful claim against the officer

personally can a claim be laid against the Government. The approach taken by Chang Min Tat J (as he then was) in *Lai Seng & Co. v. Government of Malaysia & Ors* [1973] 1 LNS 70 was distinguished because the case arose out of the revenue laws which under s. 4 GPA allows such claim to be directly brought against the Government.

[18] In the present case the cause of action are actions in tort or tort-based premised on the act or omission of officers of the 2nd defendant. As the officer or officers who were responsible for the alleged wrongdoing were not joined as defendants to the action, it is not possible in law to maintain a successful claim in tort against the Government as primary tortfeasors. It follows that the plaintiff's claim against the 2nd and 3rd defendants must fail. Accordingly, the court will not go on to consider the substantive issues.

Whether The Plaintiff Is Liable To Pay The Customs Duty Of RM261,214.56?

[19] The plaintiff's defence against the 2nd and 3rd defendant's counter-claim is mounted on two planks. Firstly, after paying the sum of RM21,454 to the 2nd defendant, the consignment of beer was released unconditionally to the plaintiff and no further action can be taken against the plaintiff for any unpaid customs duty (art. 7(2) Federal Constitution; *Jamali Adnan v. PP* [1985] 2 CLJ 415; [1985] CLJ (Rep) 167 SC). The sum of RM21,454 was paid on 26 August 2003 for offence under s. 135 of the Customs Act 1967 (1967 Act). The seizure of the beer on 2 September 2003 was also for the same offence based on the same notice of seizure dated 25 August 2003. The plaintiff should not be prosecuted and punished for the same offence more than once.

[20] In this regard it is necessary to scrutinise the evidence of the raiding officer DW3. DW3 went to the plaintiff's premises on 25 August 2003. After DW3 carried an examination of the consignment of beer he issued a notice of seizure dated 14 August 2003. He identified the said notice of seizure as the document at p. 2 Part A of the bundle of documents. The document at p. 2 is a notice of seizure dated 25 August 2003. DW3 issued this notice after he concluded his examination of the consignment of beer. Therefore, DW3's evidence that the date of the notice of seizure is 14 August 2003 is not plausible. The notice in p. 2 Part A is dated 25 August 2003 and it accords with the fact that it was issued on

A the day DW3 raided the plaintiff's premises. Further, as K1A was only presented to the 2nd defendant's on 15 August 2003 and it is not possible for the notice of seizure to have been issued before the happening of the event. On 2 September 2003 when DW3 returned to the plaintiff's premises to seize the consignment of beer, DW3
B served the same notice of seizure on PW1. The notice of seizure was acknowledged by PW1 as evidenced by the date and PW1's signature on the said notice.

[21] However, learned Federal Counsel contended that the
C compound of RM5,000 issued to the plaintiff under s. 133(1)(a) of the 1967 Act is for 'kurang bayar cukai' to customs. The issuance of the Compound does not prevent the 2nd defendant from claiming the remaining amount unpaid to the customs under s. 135 of the 1967 Act. The seizure was made only after a recalculation was made
D by DW5. Therefore the seizure was made only after the customs was satisfied that there were still an amount of duty unpaid by the plaintiff. Therefore, the issuance of the Compound does not prevent the 2nd defendant from claiming the remaining unpaid to the customs. The plaintiff's plea of estoppel does not operate against a
E public body with a statutory duty to perform. Despite the issuance of the Compound by DW3, the 2nd defendant as the government agency which derives power under the 1967 Act to collect customs duty should not be prevented from claiming the remaining amount of customs duty remaining unpaid for the consignment of beer. If
F the 2nd defendant is not allowed to recover the said amount from the plaintiff, it would be *ultra vires* the provisions of the law that allows the 2nd defendant to claim the amount of customs duty on behalf of the Minister (*Public Textiles Berhad v. Lembaga Letrik Negara* [1976] 1 LNS 120 FC; *Fairways Liquors Sdn Bhd v. Ketua*
G *Pengarah Kastam* [1993] 1 LNS 213). DW5 confirmed that his calculation of the RM261,241.56 is based on the Customs Duty Order 2003 based on tariff code 2200300900 whereby the amount of the customs duty is RM89/DAL and sale tax of 20%. Under s. 17 of the 1967 Act the plaintiff is liable to pay the unpaid customs
H duty even though there is an error on the calculation of customs duty made earlier. The amount owing is recoverable as a civil debt under s. 22B of the 1967 Act.

[22] In *Public Textiles Berhad v. Lembaga Letrik Negara, supra* LLN
I contracted to supply electricity to the appellants. By mistake it had undercharged the appellants and LLN claimed the amount of RM84,624.01 from the appellants. It was held that LLN was not

estopped from claiming the amount although the appellants had utilised the accounts rendered by LLN for the purpose of costing their products. In *Fairways Liquors Sdn Bhd v. Ketua Pengarah Kastam, supra* the plaintiff imported a consignment of brandy and paid the duty as declared in the customs declaration form. However, it transpired that the tariff code declared by the plaintiff was wrong. The defendant claimed RM234,353.46 for the short paid duty under the correct tariff code. The plaintiff contended that as they have paid the customs duty assessed by the defendant and the goods have been released, they are no longer liable to pay any additional duty. The High Court held that the defendant was entitled to collect the additional duty under s. 17 of the 1967 Act as the plaintiff had made a mistake because they did not know of the amendment which was gazetted.

[23] The facts of *Public Textiles Berhad v. Lembaga Letrik Negara, supra* and *Fairways Liquors Sdn Bhd v. Ketua Pengarah Kastam, supra* are distinguishable from the present case. After the notice of seizure dated 25 August 2003 was served on PW1 DW3 issued the Compound which was accepted by the plaintiff when it paid RM21,454. It is clearly stipulated in the Compound that upon payment of the amount and fine stated therein the consignment of beer will be released without any condition. This is a clear and unequivocal statement that the offence alleged against the plaintiff has been fully discharged and that no further claim, action or prosecution will be instituted against the plaintiff on the same consignment of beer. The subsequent seizure on 2 September 2003 was effected under the same notice of seizure dated 25 August 2003. The allegation contained therein is the same. This is not a case where the plaintiff relied on the accounts rendered by the 2nd defendant as in *Public Textiles Berhad v. Lembaga Letrik Negara, supra*. This is also not a case whereby the plaintiff mistakenly declared the wrong tariff code as in *Fairways Liquors Sdn Bhd v. Ketua Pengarah Kastam, supra*. The 2nd defendant has yet to prosecute the plaintiff for the alleged unpaid duty. No explanations were given by the 2nd defendant for the failure to prosecute the plaintiff on the alleged unpaid duty. DW5 who prepared the re-calculations of the customs duty did not explain why his computation is different from that of DW4. DW5 did not explain why his computation is different from that stated in the Compound. DW5 agreed in cross-examination that he did not follow the

guidelines in Sistem Maklumat Kastam because he did not have access to the system. DW5 did not conduct a physical check of the goods. DW5's calculation was not counter-checked or confirmed. In the premises DW5's computation has not been sufficiently made out on a balance of probability.

[24] Section 17(1) of the 1967 Act deals with payment of duty short paid. It provides as follows:

> **17. Payment of duty, etc., short paid or erroneously refunded**
>
> (1) Whenever -
>
> (a) through inadvertence, error, or for any reason, misconstruction on the part of any officer of customs, or through unintentional misstatement as to value, quantity or description by any person, or for any other reason, the whole or any part of any customs duties or other moneys payable under this Act have not been paid; or
>
> (b) the whole or any part of such customs duties or other moneys, after having been paid, have been, owing to any cause, erroneously refunded,
>
> the person liable to pay such custom duties or other moneys or the person to whom such refund has erroneously been made, as the case may be, shall pay the deficiency or repay the amount paid to him in excess, on demand being made within three years from the date on which customs duty was payable or deficient customs duty was paid or the refund was made, as the case may be, and without prejudice to any other remedy for the recovery of the amount due, any goods belonging to such person which may be in customs control may be detained until such customs duty or deficiency be paid or the refund be repaid, as the case may be.

Under s. 17 the person liable to pay such customs duty shall pay the deficiency on demand. In this instance the 2nd defendant exercised his power under this provision when DW3 demanded under the notice of seizure dated 25 August 2003 that the plaintiff pay the deficiency of RM16,454. The plaintiff paid up the deficiency and compound of RM5,000. However, on 2 September 2003 DW3 returned to the plaintiff's premises demanding payment of another deficiency of RM261,214.56 under the same notice of seizure. On this occasion DW3 was also acting pursuant to s. 17 of the 1967

Act. In the circumstances is it fair and reasonable for the 2nd defendant to demand payment of the deficiency under s. 17 on the second occasion? Section 17 provides for demand to be made when there is inadvertence or error on the part of any customs officer. The court is of the view that this provision may be resorted to in a situation in which there is a deficiency due to one instance of inadvertence or error on the part of the customs officer. It should not be extended to cover situations of instances subsequent to the first instance. To hold otherwise would be to imply that the 2nd defendant may resort to s. 17 without any limit to the number of instances the errors or inadvertence may have occurred. To interpret s. 17 in that manner would offend against art. 7 of the Federal Constitution as it opens a person to repeated prosecutions for the same offence. This interpretation is also borne out by the Compound which clearly states that the goods are released without any condition. In the result the question is answered in the negative.

[25] For the foregoing reasons the court makes the following orders:

(1) the plaintiff's claim against the 1st defendant is allowed with costs in prayer (c) with damages to be assessed by the Deputy Registrar; and prayer (d);

(2) the plaintiff's claim against the 2nd and 3rd defendants is dismissed with costs; and

(3) the 2nd and 3rd defendants' counterclaim is dismissed with costs.